EMPLOYEES PROVIDENT FUND BOARD *a*

v.

THE HONGKONG & SHANGHAI BANKING CORP LTD

HIGH COURT MALAYA, IPOH *b*
CLEMENT SKINNER JC
[CIVIL APPEAL NO: 11-89-96]
15 MARCH 2000

CIVIL PROCEDURE: *Res Judicata - Parties - Whether relationship of parties in both proceedings similar - Whether issues or cause of action had been litigated - Judgement in earlier proceedings - Whether should be given restricted operation* *c*

The appellant and the respondent were co-defendants in an action commenced by one Nadarajah Manickam. Judgement in default of appearance was entered against the appellant. Subsequently, upon being served with a garnishee order obtained by Nadarajah, the appellant settled the judgement sum. Nadarajah then discontinued the action against the respondent. Thereafter, the appellant commenced the instant action against the respondent to recoup the amount it had paid to Nadarajah. At the hearing, the respondent raised the following preliminary objections: (i) the doctrine of *res judicata* would operate as a judgement in default had been entered against the appellant who therefore was estopped from bringing the action against the respondent; (ii) the action was statute barred; and (iii) the appellant had been guilty of laches, acquiescence and delay in bringing the action against the respondent. The magistrate upheld the objections and dismissed the appellant's claim. The appellant appealed. *d* *e* *f*

Held:

[1a] In the earlier proceedings, the relationship of the appellant and the respondent was not that of a plaintiff and defendant such that it could be said that there was a cause of action or issue between them. *g*

[1b] As there was never any issue between them that was heard and tried, it could not be said that the respective liability of each party had been litigated. Therefore, the submission of the respondent's counsel on *res judicata* was misconceived. *h*

[2] The default judgement against the appellant must be given a restricted operation and be regarded as a decree which adjudged that Nadarajah was entitled to recover from the appellant a specified sum of money. That judgement would estop the appellant from denying such a fact but nothing more. *i*

[3] Moreover, as the default judgement was not obtained by the respondent against the appellant, it could not be claimed that the judgement decided the very same issues that were now raised between the appellant and the respondent in this action.

[4] The question as to when the appellant discovered the fraud was not suitable for determination as a preliminary objection. Evidence should be adduced before the court and the appellant should be entitled to a trial on the defence of limitation.

[5] The defence of laches and acquiescene, being equitable remedies, must give way to the statutory bar found in the Limination Act 1953 and so would not apply in the instant appeal.

[Appeal allowed with costs.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

Henderson v. Henderson [1843] 3 Flare 100 ***(refd)***

Kok Hoong v. Leong Cheong Kwang Mines Ltd [1964] MLJ 49 ***(refd)***

North West Water Ltd v. Binnie & Partners [1990] 3 All ER 547 ***(foll)***

Tay Tuan Kiat & Anor v. Pritam Singh Biar [1987] 1 MLJ 276 ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 29

Subordinate Courts Rules 1960, O. 12 r. 6

Other source(s) referred to:

Charlesworth On Negliqence, 4th edn, p. 6132

Halsburys Laws, vol. 16, para. 1478

For the appellant - S Suresh; M/s RK Nathan & Co

For the respondent - A Silvanathan; M/s Kean Chye & Sivalingam

Reported by Izzaty Izzuddin

JUDGMENT

Clement Skinner JC:

This appeal is brought by the Employees Provident Fund Board, (hereafter the appellant) the plaintiffs in this suit. The appeal is against the decision of the learned magistrate who on 16 October 1996 dismissed the appellant's claim against the defendant bank (hereafter the respondent) on preliminary objections taken by counsel for the respondent at the trial of this action.

On 28 February 1986, one Nadaraiah s/o Manickam (hereafter Nadarajah) commenced proceedings in Civil Suit No. 21-38-86 (the earlier proceedings) against both the appellant and the respondent as co-defendants, for loss allegedly caused to Nadarajah by their negilgence and fraud. Nadarajah alleged that in 1978 he was a member of the Employees Provident Fund with a sum of RM15,367.07 standing to his credit. In that year, he submitted an application to withdraw the said sum from the appellant. Nadarajah did not receive a reply and so believed his application for withdrawal was rejected. Some five years later, in July 1983, Nadarajah applied again to withdraw his money from the appellant. This time, he was informed by the appellant that he had already withdrawn the said sum on 16 October 1978; the money having been released to him by a warrant No. A 525512 (hereafter the warrant) issued by the appellant in his favour for that purpose. Nadarajah protested that he had never received the money. As a result of investigations by the appellant, it was revealed that apparently on 24 October 1978, some person opened a Savings Account No. 381-7-011624 (the savings account) at the respondent's branch at Ipoh, in the name of Nadarajah, and paid the warrant into the savings account. Thereafter, on three subsequent dates, all the monies from the savings account was withdrawn. Nadarajah thus commenced the earlier proceedings against the appellant (as 2nd defendant) and respondent (as 1st defendant) on 28 February 1986. The summons was duly served on the appellant who failed to enter an appearance. The respondent however, on being served, entered an appearance and filed a defence. Nadarajah then obtained a judgment in default of appearance against the appellant on 12 August 1986. After a lapse of some two years, on 28 December 1988, Nadarajah obtained a garnishee order against the appellant whereupon the appellant settled the judgment sum. Upon being paid the judgment sum by the appellant, Nadarajah discontinued the earlier proceedings against the respondent.

On 31 March 1989 the appellant commenced these proceedings against the respondent to recoupe from the respondent the sum paid to Nadarajah together with interest thereon which by then amounted to some RM18,381.56. The appellant allege they are entitled to recover this sum from the respondent on the grounds that the respondent had wrongfully converted the said sum to their own use or the respondent had been guilty of fraud or negligence in having allowed the warrant to be negotiated at the respondent's bank.

The respondent filed a defence to the appellant's action and deny any wrongdoing. In its defence, the respondent avers that the loss suffered by the appellant was caused by their own negligence. The respondent also avers that the appellant's action is not maintainable owing to laches, acquiescence and delay on the part of the appellant in bringing this action. Finally, the respondent says the appellant's claim is barred by limitation as it did not accrue within six years of the bringing of this action.

When this suit was called on for hearing on 5 October 1996, the respondent raised preliminary objections against the suit being heard. The objections were;

(a) the appellant in having allowed a judgment in default to be entered against it, the doctrine of *res judicata* would operate to estop the appellant from bringing this action;

(b) the action is statute barred;

(c) the appellant has been guilty of laches, acquiescence and delay in bringing this action.

On 16 October 1996 the learned magistrate upheld the preliminary objections and struck out the appellant's summons and statement of claim. Hence this appeal.

I now consider the preliminary objections and the submissions raised in respect thereof.

Res Judicata

The submission of Mr. Silvanathan of counsel for the respondent is that "there were earlier proceedings between the same parties on the same subject matter and upon the same cause of action; the matters directly and substantially in issue had been heard and finally decided by the court and execution proceeded with." It was counsel's submission that having failed to put forward its claim in the earlier proceedings due to its own fault and negligence, the doctrine of *res judicata* would operate to estop the appellant from "raising the same cause of action and the same issues in this suit."

Counsel for the appellant on the other hand submitted that the doctrine of *res judicata* had no application to the facts of this case as the judgment in the earlier proceedings did not decide the issues now raised in this suit between the appellant and respondent. In any event, submits counsel for the appellant, a judgment in default cannot give rise to an estoppel as such a judgment constitutes an exception to the doctrine of *res judicata*.

Before considering the merits of these submissions, I should first deal with the principles involved in this area of the law.

The authorities cited to me show that the public policy of the law is that it is in the public interest that there should be a finality to litigation. No one should be vexed twice for the same cause of action; there should not be multiplicity of proceedings. Therefore, where a given matter between two parties has been adjudicated upon by a court, the doctrine of *res judicata*, in its wider application, will operate to prevent the parties or their privies from reagitating not only the

points actually decided by the court but also issues which might have been but which were not brought forward, either deliberately or due to negligence or inadvertance. See the Supreme Court decision in *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 AMR 2559.

However, the authorities also show that there are exceptions to the application of the doctrine of *res judicata*. In the course of his judgment in the *Asia Commercial Finance case*, Peh Swee Chin SCJ., stated that a default judgment may constitute such an exception. In so stating, Peh Swee Chin SCJ., made reference first to the passage in the judgment of Wigram VC in the celebrated case of *Henderson v. Henderson* [1843] 3 Flare 100 p. 115: which reads:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, excercising reasonable diligence might have brought forward at the time.

His Lordship Peh Swee Chin SCJ., then went on to say:

> It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits,... Please see the finer points of law in regard to default judgments from the position of the doctrine of *res judicata* in *Kok Hoong v. Leong Cheong Kwang Mines Ltd.* [1964] MLJ 49.

In *Kok Hoong v. Leong Cheong Kwang Mines Ltd*., their Lordships of the Privy Council discussed the operation of the doctrine of *res judicata* in the context of a judgment in default. They opined that while from one point of view a default judgment can be looked on as a judgment by consent and therefore capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, yet, from another point of view, a default judgment might be regarded as nothing more than establishing as a fact that a defendant has for unascertained reasons, negligence, ignorance or indifference, allowed judgment to be entered against him in a particular suit in question. Given these two views, their Lordships went on to say that:

> There is obvious and indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the Court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.

Their Lordships then observed that while in certain contexts, the dictum of Wigram VC in the case of *Henderson v. Henderson* (which I have already set out above) had been given very wide operation, in the context of a default

judgment, the doctrine must be given a much more restricted operation. This is how their Lordships expressed their view:

> Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigours of any principle as widely formulated as that of *Henderson v. Henderson, Supra.* It may well be doubted whether the learned Vice Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment could not naturally fall into his reservation of special cases. In any event, it is clear from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment.

My understanding of the decision in *Kok Hoong's* case is that, while a default judgment is capable of giving rise to an estoppel, it would be wrong to apply the full rigours of the doctrine of *res judicata* to every case involving a default judgment, without reference to the particular facts before the court. In an appropriate case, where the facts warrant it, a much more restricted operation will be given to any estoppel arising from a default judgment. Such a judgment will only estop what must "necessarily and with complete precission" have been decided by that judgment, from being reopened before the court on another occassion.

I now turn to consider the particular facts of this case to determine whether or not the full rigours of the doctrine should be applied. It will be recalled that it was the submission of counsel for the respondent that the earlier proceedings were between the same parties on the same subject matter and upon the same cause of action and the matter directly and substantially in issue between the parties had been heard and finally decided upon by the court. The question is, is that an accurate description of the position between the appellant and respondent? I do not think it is and I say so for the following reasons. Firstly, it is important to recognise that the position of the appellant and respondent to each other in the earlier proceedings was that of co-defendants. They did not occupy the position of plaintiff and defendant respectively so that it could be said there was a cause of action or issue between them. It would have been open for either of them, after entering appearance, to invoke the provisions of O.12 r.6 Subordinate Court Rules (SCR) to claim contribution or indemnity against the other, in which event, it would then be correct to say that a cause of action or issue had arisen between them. Thus, the submission of counsel for the respondent, that the matter directly and substantially in issue between the parties had been heard and finally decided is incorrect - there was never any issue between the appellant and respondent that was heard and tried so that it can legitimately be said "that the respective liability of each party was litigated and very fully litigated" which was the basis of the application of the doctrine in the case of *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 at p. 555.

Secondly, what must the default judgment be taken to have decided in the earlier proceedings? In answering this question, it is essential to recognise that the appellant and the respondent had different roles to play in the loss allegedly caused to Nadarajah. The role played by the appellant was in processing the application allegedly submitted by Nadarajah and thereafter issuing out the warrant in payment. The role played by the respondent was in opening the savings account in the name of Nadarajah and thereafter negotiating the warrant through such account and paying out the proceeds of the warrant to persons other than Nadarajah. So, what can the default judgment against the appellant stand for? It must, in my judgment, be given a restricted operation and regarded as a decree that adjudges that Nadarajah was entitled to recover from the appellant a sum of RM15,367.07 being the value of the warrant issued in Nadarajah's name. The judgment would estop the appellant from denying such fact and nothing more. But, what the appellant now alleges in this suit against the respondent relates to the matters concerning the role played by the respondent in opening the savings account, negotiating the warrant through that account and thereafter paying out the proceeds to persons other than Nadarajah, which are clearly matters not determined in the default judgment.

Thirdly, the default judgment which the respondent hopes to invoke against the appellant is not a judgment obtained by the respondent against the appellant. Since it was obtained by Nadarajah, I doubt very much if it can now be claimed by the respondent that that judgment decides the very same issues that is now raised between the appellant and the respondent in this suit, that is, the role played by the respondent in opening the savings account and negotiating the warrant through it. In fact, counsel for the respondent has not attempted to show what the issues between Nadarajah and the appellant in the earlier proceedings were and that it is those same issues which the appellant seeks to reagitate here.

Accordingly, on the particular facts of this case, I find that it would be inappropriate to apply here the full rigours of the doctrine of *res judicata*. The default judgment is to be given a restricted operation. I accordingly hold that the appellant is not estopped from bringing this claim against the respondent.

Limitation

The appellant has pleaded a cause of action founded on conversion, negligence and fraud against the respondent. They are all tortious in nature. Section 6(l)(a) of the Limitation Act provides that the period of limitation for an action in tort is six (6) years from the date on which the cause of action accrued.

As far as the action brought in negligence is concerned, counsel for the respondent submitted that the appellant's cause of action accrued when actual damage was caused to the appellant by the alleged negligent act of the

respondent in allowing an unauthorised person to open the savings account in the name of Nadarajah and thereafter negotianing the warrant and paying out the money to some unknown person. Those events occured as early as 24 October 1978 when the account was opened and was complete when the money was paid out fully on 17 November 1978. The appellant's action herein having been commenced on 31 March 1989, counsel for the respondent submitted it was clearly time barred. Counsel for the appellant has not advanced any arguments to oppose or controvert what is stated above.

On the question when a cause of action is said to accrue, Mr. Silvanathan referred to *Charlesworth On Negligence,* 4 Edn. at p. 6132 which states:

> In an action of negligence the cause of action accrues at the time when the damage was actually caused, even though its consequence may not be apparent until later.

Applying what is stated there to the facts disclosed here, I find that from the appellant's statement of claim, the alleged acts of negligence of the respondent which the appellant relied upon are in fact those acts described by counsel for the respondent in his submission. That being the case, damage was caused to the appellant when the savings account was allegedly opened by an unauthorised person on 24 October 1978 and completed when the last withdrawal was made on 17 November 1978. At the latest, the appellant's cause of action accrued from that date. Having commenced these proceedings in negligence on 31 March 1989, the appellant's claim is clearly barred by s. 6(1) of the Limitation Act.

In so far as the appellant's action based on fraud is concerned, s. 29 of the Limitation Act provides that where the action is founded on fraud, the period of limitation shall not begin to run until the plaintiff has discovered or could with reasonable diligence have discovered the fraud. It is the submission of counsel for the respondent that the savings account was opened on 24 October 1978. The warrant was then according to counsel, paid into the account but no money could be withdrawn from the account until the warrant was first cleared for payment by the appellant; for that to happen, the warrant had to be sent back to the appellant for clearance, at which point in time, the appellant would or should have verified whether the thumprint on the warrant was that of Nadarajah or not. Thus, according to counsel for the respondent, the appellant knew or ought to have discovered the forged thumprint on the warrant when it was sent back to the appellant for clearance on 3 November 1978. Time thus began to run from that date. In having commenced this action only on 31 March 1989, the action in fraud is clearly barred, submits counsel.

Counsel for the appellant takes a different view. He submitted that time only began to run in July 1983 when Nadarajah wrote to the respondent for the second time to claim his monies. It was only then that the respondent discovered

that someone had fraudulently negotiated the warrant and absconded with the money. It was also only then that the respondent themselves realised that someone had fraudulently opened the savings account on behalf of Nadarajah.

Whether the appellant knew or could with reasonable deligence have discovered the fraud as early as November 1978 as alleged by the respondents, or, whether the appellant only became aware of the fraud in June 1983 as alleged by their counsel, is a question of fact to be decided on evidence regarding the state of knowledge of the appellant in 1978 and 1983. That evidence would relate, in the context of this case, to not only the procedures adopted at the respondent bank for negotiating an EPF warrant and whether payment out of the proceeds of that warrant takes place before or after the warrant is cleared, but also the procedures adopted by the appellant in clearing for payment its own warrants which are negotiated through a financial institution. Having discussed briefly the type of evidence that would need to be adduced in order to decide the question of fact earlier posed, the question that must be asked is, when the preliminary objection was taken, was there such evidence before the learned magistrate? That question must be answered in the negative. In the circumstances, I find that the question as to when the appellant discovered the fraud was not suitable for determination as a preliminary objection on the basis of the evidence before the court and should have been tried.

Before leaving the submissions on limitation, it has not escaped my attention that no preliminary objection was raised on the defence of conversion being time barred. On that score, the appellant are entitled to a trial on that defence too.

Laches, Acquiescence and Delay

It is the case for the respondent that in not defending the earlier proceedings, the appellant is now estopped from c1aiming against the respondent because they had by their conduct led the respondent to believe that the appellant had forgone its rights in the earlier proceedings. It was also submitted that in not defending the earlier proceedings, the appellant had caused the respondent to alter their position to their detriment in that:

(a) the respondent cannot proceed against Nadarajah as their claim against him is time barred;

(b) there will be difficulty in gathering witnesses and evidence due to the passage of time.

I regret I find no merit in these submissions. Firstly laches and acquiescence are closely related equitable defences. *Halsburys Laws* Vol. 16, para 1478 states:

> The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time.

Halsburys also states in para. 1476

> The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable.

To me, the rationale for not allowing a plea available in equity to defeat a limitation period provided by statute is found in the maxim, equity follows the law. Thus where a statute gives to a party a time period for doing a thing, equity will follow the law instead of curtailing it.

In our case, the Limitation Act by s. 6(1) expressly provides for a period of limitation for fraud. The defences of laches and acquiescence (as understood in the sense of delay) being equitable remedies must give way to the statutory bar found in our Limitation Act and so would not apply in this case. (For the application of a similar bar in Singapore see the case of *Tay Tuan Kiat & Anor v. Pritam Singh Biar* [1987] 1 MLJ 276).

Secondly, in so far as the respondent seeks to rely on acquiescence to defeat the appellant's claim by way of an estoppel, I believe the appellant is not so estopped for the reasons already given when discussing *res judicata*.

Thirdly, whether the respondent has by the passage of time suffered prejudice through difficulty in gathering witnesses and evidence, is a question of fact that needs to be proved by evidence. But the question is, when the preliminary objection was taken, was there evidence before the learned magistrate about who amongst the respondent's officers dealt with this matter and that they are now no longer available or have dissappeared without trace? That question must also be answered in the negative. In the absence of such evidence, the submission about prejudice made by counsel for the respondent must be regarded as a bare allegation made from the Bar watch cannot be acted on. Likewise the submission that the respondent has suffered prejudice because they are unable to trace Nadarajah and any claim they may have had against him is now barred must be regarded as a bare allegation made from the bar unsupported by any evidence beffore the learned magistrate as to what attempts had been taken to trace Nadarajah, if at all. Whether or not the respondent's claim against Nadarajah is barred is a question of fact dependent on two things: (a) whether Nadarajah was himself guilty of fraud and (b), when did the respondent discover his fraud. Needless to say, there was no evidence before the court on which these questions could be decided.

For all the reasons given above, I allow the appeal with costs.